Office-Supreme Court, U.S.
FILED
APR 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1769

In the Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE BROADCASTING COMPANY, INC.,
APPELLANT,

v.

COMMISSIONER OF REVENUE,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
Tel. No. (617) 357-9300
By PAUL J. LAMBERT
JOSEPH L. KOCIUBES
JANE E. SERENE
Attorneys for Appellant

Blanchard Press, Inc., Boston, Mass. — Law Printers

I

QUESTIONS PRESENTED

I. Is the application of the Massachusetts taxing statutes so as to exempt from local taxation print media but not broadcast media violative of the First Amendment, particularly as interpreted in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936)?

II. Is the application of the Massachusetts taxing statutes so as to exempt selected newspapers from certain local taxation (by classifying them as "manufacturing" corporations) but not so to exempt a competing local television station violative of the Equal Protection Clause?

A. Does Massachusetts have a compelling state interest which justifies taxing property of television and radio while exempting property of selected newspapers?

B. Is there any rational basis for the disparate taxing treatment?

TABLE OF CONTENTS

	Page
Questions Presented	I
Introduction	1
Opinion Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
The Questions are Substantial	5
I. The First Amendment Prohibits Massachusetts From Applying Its Taxing Statutes So As To Tax Certain Media While Exempting Other Media From Taxation	6
II. *Grosjean* v. *American Press Co.* Is Not Distinguishable On Its Facts From This Case. The Court Below Erred In Attempting To So Distinguish It Based Upon The Perceived Motives Of The State In *Grosjean*	11
III. The Fourteenth Amendment Prohibits Massachusetts From Applying Its Taxing Statutes So As To Tax Broadcast Media While Exempting Print Media FromTaxation	14
A. The Application of the Massachusetts Taxing Statutes so as to Exempt Print Media While Taxing Broadcast Media Furthers No Compelling State Interest	14
B. The Application of the Massachusetts Taxing Statutes so as to Exempt Print Media While Taxing Broadcast Media is Founded Upon No Rational Basis	16
Conclusion	18
Appendix A	
Opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts	A-1
Appendix B	
Judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts	A-8

PRECEDING PAGE WAS BLANK

Appendix C
Appellant's Requests for Rulings of Law A-9
Appendix D
Order of the Appellate Tax Board for the Commonwealth of Massachusetts A-11
Appendix E
Decision of the Appellate Tax Board for the Commonwealth of Massachusetts A-12
Appendix F
Notice of Appeal to the Supreme Court of the United States A-13
Appendix G
Statutory Provisions A-14
Appendix H
Foreign Corporation Certificate of the Hearst Corporation A-17

Table of Authorities

Cases.

A. Magnano Co. v. *Hamilton*, 292 U.S. 40 (1934) 12
Allied Stores of Ohio, Inc. v. *Bowers*, 358 U.S. 522 (1959) 17
Arizona v. *California*, 373 U.S. 546 (1963) 12
Assessors of Boston v. *Commissioner of Corporations & Taxation*, 323 Mass. 730, 84 N.E. 2d 129 (1949) 17
Bates v. *Little Rock*, 361 U.S. 516 (1960) 14
Beals v. *Commissioner of Corporations and Taxation*, 370 Mass. 781, 352 N.E. 2d 692 (1976) 15
Board of Tax Commissioners v. *Jackson*, 283 U.S. 527 (1931) 17
Bonnar v. *United States*, 438 F.2d 540 (Ct. Cl. 1971) 13
Boston & Me. Railroad v. *Billerica*, 262 Mass. 439, 160 N.E. 419 (1928) 5
Buckley v. *Valeo*, 424 U.S. 1 (1976) 8, 9, 15
Campbell v. *United States*, 365 U.S. 85 (1961) 14

Page

Carroll v. *Boston Elevated Railway*, 200 Mass. 527 (1909) 13
Chicago B. & Q. R. Co. v. *Illinois*, 200 U.S. 561 (1906) .. 3
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 16
Commissioner of Corporations and Taxation v. *Assessors of Boston*, 321 Mass. 90, 71 N.E. 2d 874 (1947) 5, 17
Cox v. *Louisiana*, 379 U.S. 536 (1965) 7
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 282 (1921) 3
DeMarines v. *KLM Royal Dutch Airlines*, 580 F.2d 1193 (3rd Cir. 1978) 13
Elrod v. *Burns*, 427 U.S. 347 (1976) 14
Epstein v. *Boston Housing Authority*, 317 Mass. 297, 58 N.E. 2d 135 (1944) 13
Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) ... 8
FCC v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) 16
First Federal Savings & Loan Ass'n v. *State Tax Commission* 372 Mass. 478, 363 N.E. 2d 474 (1977) 15
First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 5, 9
Grosjean v. *American Press Co.*, 297 U.S. 233 (1936). 5, 6, 7, 8, 10, 11, 14, 15, 16, 17
Herndon v. *Lowry*, 301 U.S. 242 (1937) 14
Keniston v. *Board of Assessors of Boston*, Mass. Adv. Sh. (1980) 1485 15
Kingsley International Pictures Corp. v. *Regents of University of New York*, 360 U.S. 684 (1959) 3
Lawrence v. *State Tax Commission*, 286 U.S. 276 (1932). 3
Lehnhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) 15
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 10
Lewis-Simas-Jones Co. v. *Southern Pacific Co.*, 283 U.S. 654 (1931) 13
Liggett Co. v. *Lee*, 288 U.S. 517 (1932) 17
Lovell v. *Griffin*, 303 U.S. 444 (1938) 8, 14

Page

Martin v. *Struthers*, 319 U.S. 141 (1943) 9
McCray v. *United States*, 195 U.S. 27 (1904) 12
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 17
Murdock v. *Pennsylvania*, 319 U.S. 105 (1943) 9
N.A.A.C.P. v. *Button*, 371 U.S. 415 (1963) 14
Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972) 8, 9, 14
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969). 8, 17
Rosenbloom v. *Metromedia, Inc.*, 403 U.S. 29 (1971) 8
Sabatino v. *Curtiss National Bank*, 446 F.2d 1046 (5th Cir. 1971) 13
Schneider v. *State*, 308 U.S. 147 (1939) 14
Sherbert v. *Verner*, 374 U.S. 398 (1963) 14
Southern Railway v. *Greene*, 216 U.S. 400 (1910) 17
Spence v. *Washington*, 418 U.S. 405 (1974) 9
Thomas v. *Collins*, 323 U.S. 516 (1945) 14
United States v. *New York, N.H. & H.R. Co.*, 355 U.S. 253 (1957) 14
United States v. *O'Brien*, 391 U.S. 367 (1968) 12, 13
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 9
Weinstock v. *Town of Hull*, 367 Mass. 66, 323 N.E. 2d 867 (1975) 15
West v. *State Street Exchange*, 250 Mass. 537, 146 N.E. 37 (1925) 13
WHYY, Inc. v. *Glassboro*, 393 U.S. 117 (1968) 17
Williams v. *Rhodes*, 393 U.S. 23 (1968) 14

Constitutional Provisions and Statutes.

United States Constitution, Amendment I ..... *passim*
United States Constitition, Amendment XIV .. 3, 14, 15, 16
United States Code:
28 U.S.C. §1257(2) 2

Page

Massachusetts General Laws
c. 59, § 5, clause 16(3) 2, 7
c. 63, § 30(10) 7
§ 38C 2, 3
§ 42B 2, 3, 7
Massachusetts Statutes 1978
c. 516 § 5 3

Miscellaneous.

IX Wigmore, *Evidence* (3d ed. 1940) 13

In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-

WESTINGHOUSE BROADCASTING COMPANY, INC.,
APPELLANT,

v.

COMMISSIONER OF REVENUE,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

Introduction

Massachusetts exempts from certain taxation property of corporations classified pursuant to statute as "manufacturing" corporations. Massachusetts applies its statutes so as to grant the favorable classification to certain elements of the media—selected newspapers—but not to other segments. Appellant, Westinghouse Broadcasting Company, Inc. ("Westinghouse")[1] operates a television and radio station in Boston and has been

[1] The sole parties to this proceeding are those listed in the caption—Westinghouse and the Massachusetts Commissioner of Revenue. Westinghouse's parent company is Western Electric Corporation. All subsidiaries and affiliates are wholly-owned except CATV Enterprises, Inc., Home Theater Network, Inc. and Teleprompter Corporation.

denied the favorable classification. The ultimate issue raised is whether a state may apply its taxing statutes in such a fashion as to favor certain segments of the media and burden other segments.

Opinion Below

Westinghouse appeals from a decision of the Supreme Judicial Court for the Commonwealth of Massachusetts (App. A.) reported at Mass. Adv. Sh. (1981) 183, 417 N.E.2d 191 (1981). The case reached the Supreme Judicial Court on direct appeal from the Massachusetts Appellate Tax Board where the case was tried. The Appellate Tax Board found for the Commissioner of Revenue (the "Commissioner") (App. E.) without written opinion.

Jurisdiction

Westinghouse appeals from a judgment of the Supreme Judicial Court of Massachusetts upholding the constitutionality of a Massachusetts taxing scheme pursuant to which the two major Boston newspapers are classified as "manufacturing" corporations. The classification exempts certain of their property from local taxation while the property of Westinghouse—the owner and operator of a television and radio station in Boston—is taxed. The judgment below (App. B.) was entered on January 23, 1981. Westinghouse's timely notice of appeal (App. F.) was filed on April 1, 1981. Jurisdiction is conferred pursuant to 28 U.S.C. §1257(2).

Statutes Involved

This appeal involves the validity under the First and Fourteenth Amendments to the United States Constitution of Mass. Gen. Laws, c.59, §5, cl. 16(3), c.63, §38C, and c.63, §42B as applied. The text of these provisions appears in Appendix G.

Statement of the Case

Prior Proceedings

Westinghouse applied to the Commissioner[2] for classification as a "foreign manufacturing corporation" pursuant to Mass. Gen. Laws c.63, §42B. A foreign corporation so classified (and a domestic corporation similarly classified pursuant to Mass. Gen. Laws c.63, §38C) is exempted from local taxation on much of its property. (App. A. at A-1; App. G. at A-14, 15.) The Commissioner refused to classify Westinghouse as a manufacturing corporation. Westinghouse then appealed to the Massachusetts Appellate Tax Board where a trial (with most of the relevant facts being stipulated) was held. At the trial Westinghouse argued, *inter alia*, that the First and Fourteenth Amendments prohibit the application of the taxing statutes so as to favor newspapers (by exempting them from certain local taxation) over Westinghouse. The Appellate Tax Board wrote no opinion, but entered judgment for the Commissioner. Westinghouse appealed to the Supreme Judicial Court, again raising, *inter alia*, the constitutional questions. The Supreme Judicial Court affirmed. (App. B.) In its opinion, the Supreme Judicial Court devoted but one paragraph (App. A. at A-6) to the constitutional issues.[3]

[2] The appellee was then called the State Tax Commission. Effective August 1, 1978, the State Tax Commission was abolished and the position of Commissioner of Revenue was created, successor to all the powers and duties of the State Tax Commission. Mass. St. 1978, c.516, §5. *See* App. A. at fn. 2.

[3] By upholding the statute in the face of Westinghouse's constitutional challenge, the court, of course, denied the federal claims. The cursory treatment by the Supreme Judicial Court of the constitutional questions pressed by Westinghouse has no adverse impact on this Court's jurisdiction, as "the necessary effect of the judgment [was] to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would [have] require[d] a judgment different from one resting upon some ground of local or general law." Chicago, B. & Q. R. Co. v. Illinois, 200 U.S. 561, 580 (1906). The failure of the Supreme Judicial Court to recognize the claimed right "necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied." *Id.* at 581. *Accord*, Lawrence v. State Tax Comm'n of Mississippi, 286 U.S. 276, 282 (1932); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921). *See generally* Kingsley International Pictures Corp. v. Regents of the University of New York, 360 U.S. 684 (1959).

Facts

Westinghouse owns and operates a television and a radio station in Boston. Some 317 people are employed directly or indirectly in the production, promotion or transmission of programs broadcast by Westinghouse. (App. A. at A-3.)

The bulk of Westinghouse's television and radio stations' income is derived from the sale of advertising which is broadcast in conjunction with programs actually produced by Westinghouse.[4] (App. A. at A-2, 3.) In seeking advertising, Westinghouse competes with the major newspapers in the area. (App. A. at A-6.)

Westinghouse produces and broadcasts television and radio programs on a variety of subject matters, including news, investigative reports and news features, weather, sports reports and events, consumer information and similar features, theater and art reviews, public service announcements, editorials, and various types of entertainment and advertising. (App. A. at A-2.) In short, Westinghouse produces and broadcasts much of the same type of material as is published in newspapers.

The corporations which publish the two major Boston daily newspapers were classified by the Commissioner as manufacturing corporations. (App. A. at A-6.) One, The Hearst Corporation, publisher of the *Boston Herald Traveler*, listed "newspaper publishing" as its sole activity in Massachusetts in the Foreign Corporation Certificate which it executed under oath and filed pursuant to law with the Secretary of the Commonwealth. (That Foreign Corporation Certificate was admitted into evidence at the trial. App. H.)

As "manufacturing" is defined in Massachusetts as the transforming of raw or finished materials through human skill and knowledge into something possessing a new nature and name and

---

[4] Some 95% of the radio station's revenues are derived from the sale of advertising aired during locally produced programming. Approximately two-thirds of the income generated by the television station comes from the sale of advertising broadcast during programs actually produced by Westinghouse (*e.g.*, the local news).

adapted to a new use,[5] the record contains significant detail as to the mechanical processes involved in the production and broadcasting of television and radio programming. Included are the transformation of light into electrical impulses, the enhancements and modifications to the electrical impulses and the ultimate creation of a one-watt micowave signal which is coupled with the electrical impulse and which is then transformed and built into a 60,300 watt electromagnetic signal which is radiated into the atmosphere.[6] (App. A. at A-2.)

The Questions Are Substantial

This case raises significant questions involving fundamantal constitutional rights. Involved are basic issues concerning the extent to which state taxing schemes can be used to favor certain elements of the media over others. The case involves another attempt by the Massachusetts court to permit the drawing of lines in the First Amendment area based upon the identity of the speaker or nature of the speech, *cf. First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), even as this Court rejects such distinctions. The opinion below represents a misunderstanding both of this Court's holding in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936) and of its significance. *Grosjean* is not a mere historical curiosity limited in its application to Huey Long's Louisiana as the court below implied. (App. A. at A-8.) A constitutional holding of this Court cannot be distinguished by reference to perceived motives of legislative and executive branches of specific state governments. This case raises not only significant First and Fourteenth Amendment issues, but basic jurisprudential issues as to the role of precedent in constitutional litigation.

---

[5] *E.g.*, Comm'r of Corps. and Taxation v. Assessors of Boston, 321 Mass. 90, 94, 1 N.E. 2d 874 (1947); Boston & Me. R.R. v. Billerica, 262 Mass. 439, 445, 160 N.E. 419 (1928) (App. A at A-4)

[6] Westinghouse filed requests for rulings of law with the Appellate Tax Board. (App. C.) In allowing certain of those requests, the Appellate Tax Board ruled that for instant purposes, it was irrelevant that Westinghouse's transformations—unlike those of the traditional printing press—were invisible to the naked eye. (App. D.) The Supreme Judicial Court did not disturb this ruling.

I. The First Amendment Prohibits Massachusetts From Applying Its Taxing Statutes So As To Tax Certain Media While Exempting Other Media From Taxation.

In *Grosjean*, this Court struck a Louisiana statute which imposed a two percent license tax on those involved in selling advertising published "in any newspaper, magazine, periodical or publication whatever having a circulation of more then 20,000 copies per week, or displayed and exhibited . . . by means of moving pictures . . . ."[7] 297 U.S. at 240. The constitutional infirmity of the statute in *Grosjean* resulted not from its mere imposition of a tax on members of the media: "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government." *Id.* at 250. Nor was the statute invalidated upon evidence that the tax actually had reduced circulation or chilled any newspaper's operations or expression. *Grosjean*, after all, was decided upon a facial challenge.

Despite the fact that there was no showing in *Grosjean* that any expression actually had been chilled, this Court, on First Amendment grounds, refused to countenance a taxing scheme which deliberately imposed greater burdens upon certain segments of the media than it imposed on others. The vice of the statute in *Grosjean* lay in its imposition of a tax · hich (i) deliberately curtailed "the amount of revenue realized from advertising" by the disfavored newspapers and (ii) whose "direct tendency [was] to restrict circulation." *Id.* at 244-45. There was no factual showing in *Grosjean* that circulation had been restricted—indeed, the tax was on advertising revenue. This Court reasoned that such a tax, if permitted, need only be increased for the state to curtail the advertising revenue and eventually limit the circulation of the disfavored newspapers. *Id.*

---

[7] Discussions of *Grosjean* frequently focus on the fact that newspapers with circulations in excess of 20,000 were treated differently for taxing purposes than were smaller newspapers. In fact, the statute was broader. The larger newspapers and those who displayed advertising "by means of moving pictures" were taxed. This Court did not defer consideration of that portion of the statute dealing with moving pictures, but struck the statute *in toto*.

Grosjean is dispositive and by itself invalidates the Massachusetts taxing scheme. Mass. Gen. Laws c.63, §42B and c.59, §5, cl. 16(3) as applied to Westinghouse operate in precisely the same unconstitutional fashion as did the statute in *Grosjean*.[8] By denying Westinghouse classification as a manufacturing corporation while granting that classification to the two leading Boston newspapers—entities which compete with Westinghouse for advertising revenue (App. A. at A-6.)—the statutory scheme as applied imposed a significantly greater tax on a selected segment of the media.[9] The Massachusetts taxing scheme has the same

---

[8] The fact that Massachusetts statutes are challenged as applied to Westinghouse rather than on their faces as was the statute in *Grosjean*, is of little moment to the constitutional analysis which renders both statutes invalid. *See* Cox v. Louisiana, 379 U.S. 536, 557-58 (1965) where the Court held it "clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or . . . the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute." Indeed, since the Massachusetts statutes, although facially neutral, effectively appoint the Commissioner guardian of the constitutional rights of Westinghouse and authorize him to decide which media to favor with tax exemption, their negative impact on First Amendment freedoms is all the more insidious. The distinctions being drawn in Massachusetts are more dangerous than those in Louisiana precisely because they are less visible.

[9] By not being classified as a manufacturing corporation, Westinghouse is *de facto* subject to a double tax disadvantage as compared with newspapers. For purposes of the determination of tax liability under the Commonwealth's excise tax, corporations are classified as "tangible property" or "intangible property" corporations pursuant to a ratio established in Mass. Gen. Laws c.63, §30 (10):

$$\frac{\text{Tangible property in Mass. not subject to local tax}}{\text{Total tangible and intangible assets allocable to Mass.} - \text{(minus) Mass. assets that are subject to local tax} + \text{(plus) certain stock investments in other foreign corporation}}$$

If this ratio is equal to or greater than 10%, the corporation is classified as a "tangible property corporation." Its state excise tax is calculated at the rate of $7 per $1,000 on the value of its Massachusetts tangible property that is not subject to local property tax.

However, a non-manufacturing corporation which is not exempt from the local property tax on machinery is more likely to have an applicable ratio that is less than 10%. If so, the corporation is an "intangible property corporation," and its state

inevitable tendency to curtail Westinghouse's revenues as did the tax in *Grosjean*. The First Amendment prohibits the states from being in the business—at least for taxing purposes—of favoring one segment of the media over another.[10] *Grosjean* simply is not distinguishable from the instant case.

Nor is *Grosjean* an anomaly, for it stands in a line of decisions wherein this Court has looked askance upon efforts to favor or burden speakers based upon the substance of their expression or upon their identity. Most familiar are the prohibitions against governmental action which selectively restricts speech based upon its content. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972). As Mr. Justice Powell phrased it:

> [W]hen the government acting as censor undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.

Erznoznik, 422 U.S. at 209.

---

excise tax is calculated at the rate of $7 per $1,000 value of "net worth." G.L. c.63, §30(9) sets the following formula to determine net worth:

$$\text{Mass. tangible assets not subject to local tax} + \frac{\text{Intangible assets allocable to Mass.}}{\text{Book value of total assets}} \times \text{Book value} - (\text{minus}) \text{ Liabilities}$$

Because an "intangible property corporation" has the state excise rate applied to a value that includes intangible assets, the resulting tax liability tends to be higher than that of a "tangible property corporation." Thus, when Westinghouse is denied manufacturing status: (i) its machinery is subject to local property tax, and (ii) it faces a higher state excise tax.

[10] That television and radio broadcasters enjoy the protection of the First Amendment is well established. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1970); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Even beyond the general principle articulated in Lovell v. Griffin, 303 U.S. 444, 452 (1938), that, "[t]he liberty of the press is not confined to newspapers and periodicals. . . [but] comprehends every sort of publication which affords a vehicle of information and opinion," this Court has expressly recognized that television and radio are "indispensable instruments of effective political speech." Buckley v. Valeo, 424 U.S. 1, 19 (1976).

Similarly, the First Amendment limits the power of government to impact dissemination of information by imposing selective restrictions on conduct, even when such restrictions are content-neutral. For content-neutral restrictions may have unequal effects on various types of messages or speakers whether or not discrimination is intended. Precisely because the content of the speech communicated by a parade, pamphlet, television broadcast and newspaper are apt to be different, the constitutional requirement that "government must afford all points of view an equal opportunity to be heard," *Mosely*, 408 U.S. at 95-96, requires that the various *media* be treated equally.

As for distinctions based upon characteristics of speakers, this Court has invalidated facially neutral statutes restricting the door-to-door distribution of circulars because of the discriminatory impact such restrictions have upon poorly financed speakers. *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943). Government may not justify restrictions on speech by a claim that the restricted speech has been adequately voiced by others, *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1974), or by a claim that the information sought to be disseminated may be obtained by the public from another source. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976).

This Court has rejected a congressional attempt to place a ceiling on campaign expenditures, emphasizing that, "[t]he First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley* v. *Valeo*, 424 U.S. 1, 49 (1976). Finally, this Court struck a Massachusetts statute that restricted rights of corporations to engage in political speech because, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978).

Grosjean is consistent with this line of cases. The relevant class is the media—not simply newspapers. The essential activity of both is to communicate. Westinghouse broadcasts news, reports and other informational features similar to those found in newspapers. Indeed, the bulk of Westinghouse's revenues are derived from company (as opposed to network) produced programming—programming such as the news. (App. A. at A-2, 3.) Westinghouse competes with the newspapers for revenue. (App. A. at A-6.) The very essence of Westinghouse's activities is communication. In short, this case arises in a relatively pure First Amendment context. If *Grosjean* and subsequent cases are to have significance, that significance must be that government may not pick and choose among speakers in the First Amendment arena, rewarding some and making the operations of others more costly. The Court in *Grosjean* did not need a record demonstrating more than monetary harm to the publishers of larger newspapers and exhibitors of moving pictures who were singled out for taxation precisely because state governments may not make such distinctions at all.[11]

Unlike Louisiana prior to the *Grosjean* decision, Massachusetts does not have a statute which on its face favors (or burdens) one segment of the media over another. It achieves the same effect, however, through the application of its statutes. By classifying newspapers as "manufacturing" corporations, Massachusetts exempts them from certain local property taxation while refusing to do the same for the broadcast media. Certain favored media are exempted from taxation while others are not.

---

[11] An analogy is found in the Establishment Clause of the First Amendment which prohibits government advancing or inhibiting religion. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

II. *Grosjean* v. *American Press Co.* Is Not Distinguishable on Its Facts From This Case. The Court Below Erred in Attempting To So Distinguish It Based Upon the Perceived Motives of the State in *Grosjean*.

Westinghouse's constitutional arguments—particularly its reliance upon *Grosjean*—were at the very core of its argument to the Supreme Judicial Court. That court simply was unable to distinguish the facts or holding of *Grosjean*. It tried to avoid *Grosjean* by limiting discussion of it to one sentence in the opinion, contending that the *Grosjean* holding was this Court's recognition and condemnation of "a design to put the clamps on expression by newspapers." (App. A. at A-6.) The Court below not only misread *Grosjean*, it acted out a basic jurisprudential misconception.

As indicated above, this Court in *Grosjean* invalidated the Louisiana statute because the effect of the tax it imposed was to curtail the revenue of certain members of the media; by its nature, the tax had a tendency to restrict circulation. The holding of the case is not limited to the Louisiana of the 1930's nor is it limited to cases in which a court perceives a state "design"[12] to limit circulation. Indeed, the Supreme Judicial Court's argument proves too much: If *Grosjean* could be limited to instances where an illicit "design" were felt to be present, then Massachusetts—if acting from pure motives—should be free to enact the very same statute as was struck in *Grosjean*.[13] The Supreme Judicial Court's analysis would thus lead to the conclusion that different constitutional holdings and rules apply to different states.

---

[12] Of course, there was no proof of such a "design" in *Grosjean* as the analysis was facial.

[13] Indeed, Westinghouse's position is that indirectly Massachusetts has done precisely that.

Any remaining doubt as to the scope of the *Grosjean* case vanishes upon reference to this Court's dicussion of *Grosjean* in *United States* v. *O'Brien*, 391 U.S. 367 (1968). O'Brien argued that an amendment to the Selective Service Act was unconstitutional because the legislative motive underlying the amendment was to suppress speech. In rejecting O'Brien's challenge, this Court noted that *Grosjean* did not stand "for the proposition that legislative motive is a proper basis in declaring a statute unconstitutional." Instead, it stood for the proposition that "the inevitable effect of a statute on its face may render it unconstitutional." *Id.* at 384. In *Grosjean*,

> The purpose of the legislation was irrelevant, because the inevitable effect—the 'necessary scope and operation' abridged constitutional rights.[14]

Id. at 385.

This Court declined the invitation to speculate about legislative motives, explaining,

> [U]nder settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.
>
> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .
>
> Inquiries into Congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different

---

[14] The same conclusion has been reached by this Court in other taxing cases. McCray v. United States, 195 U.S. 27, 53 (1904); A. Magnano Co. v. Hamilton, 292 U.S. 40 (1943). *See also* Arizona v. California, 373 U.S. 546 (1963).

> matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guess work. We decline to void essentially on the grounds that it is unwise legislation which Congress had the undoubted power to enact and which would be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.

Id. at 383-84.

In short, the Supreme Judicial Court committed the exact error which the lower court had committed in *O'Brien*.[15]

---

[15] The Supreme Judicial Court sought to avoid the clear import of *Grosjean* (and the Equal Protection Clause) by searching for a defect in the state of the record.

> As to the claim of invidious discrimination because certain corporations publishing newspapers received the manufacturing classification while the company did not, we are unable on the present record to make any judgment because what, precisely, the entire business of the publisher corporations consisted of was not presented in any detail. (App. A. at A-6.)

However, this observation is consistent neither with the record nor the law.

At the trial, admitted into evidence was a certified copy of the Foreign Corporation Certificate of The Hearst Corporation ("Hearst"), filed under oath with the Secretary of the Commonwealth, which describes the activities of Hearst in Massachusetts solely as "Newspaper Publishing." (App. E.) Hearst publishes one of the two major Boston newspapers. A similar showing was made for the other newspaper which received the favorable classification.

At that point, the burden of going forward shifted to the Commissioner. Carroll v. Boston Elevated Ry. Co., 200 Mass. 527, 536, 86 N.E. 793 (1909); West v. State Street Exchange, 250 Mass. 537, 146 N.E. 37 (1925); Epstein v. Boston Housing Authority, 317 Mass. 297, 58 N.E. 2d 135 (1944). *Accord* Lewis-Simas-Jones Co. v. Southern Pacific Co., 283 U.S. 654, 663 (1931); Sabatino v. Curtiss National Bank, 446 F.2d 1046, 1055 (5th Cir. 1971); DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1200 (3rd Cir. 1978); Bonnar v. United States, 438 F.2d 540, 562 (Ct. Cl. 1971); *See generally* IX Wigmore, Evidence 278-79, 285-86 (3rd ed. 1940).

This rule applies with particular force in this case. The Commissioner was a party to the litigation. If he based his decision to classify the newspapers on reasons

III. The Fourteenth Amendment Prohibits Massachusetts From Applying Its Taxing Statutes So As To Tax Certain Media While Exempting Other Media From Taxation.

A. *The Application of the Massachusetts Taxing Statutes So As To Exempt Print Media While Taxing Broadcast Media Furthers No Compelling State Interest.*

Freedom of speech and press are fundamental rights protected by the Fourteenth Amendment from state intrusion. *Schneider* v. *State*, 308 U.S. 147 (1939); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Grosjean*, *supra*. Therefore, governmental regulation affecting this freedom carries with it a presumption of unconstitutionality, *see Herndon* v. *Lowry*, 301 U.S. 242, 258 (1937), and the burden falls on the state to show that the regulation is necessary to further a compelling state interest. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438 (1963); *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976) (plurality opinion); *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). This court subjects equal protection cases involving First Amendment rights to strict and exacting scrutiny. *See, e.g., Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Bates* v. *Little Rock*, 361 U.S. 516 (1960).

The First Amendment implications of this dispute are discussed in Part I, *supra*, and that analysis shall not be repeated here, except to note that this case involves a conscious attempt by Massachusetts to apply its taxing statutes so as to exempt from local taxation property of favored segments of the media while taxing

---

not apparent, he could have taken the stand and so testified. He chose not to testify. When the means of rebutting an alleged fact are within the knowledge of the other party, it is incumbent upon him to come forward with his evidence or suffer an adverse ruling as to the matter involved. Campbell v. United States, 365 U.S. 85, 96 (1961); United States v. N.Y., N.H. and H. R. Co., 355 U.S. 253, 256 n.5 (1957). As much as the court below might like to avoid *Grosjean* by manufacturing an ambiguity about the state of the record, none exists. The uncontradicted evidence in the record is that Hearst's sole activity in Massachusetts is newspaper publishing.

the property of other segments. Given the implication of this fundamental right, [16] Massachusetts must be able to articulate a compelling state interest to justify its disparate treatment of the print and broadcast media.[17] Because there is no such interest, the Massachusetts scheme as applied is invalidated by the Equal Protection Clause of the Fourteenth Amendment even if it is not invalidated by the First Amendment alone.

Despite the fact that the equal protection argument was raised at trial, the Commissioner made no attempt to justify the disparate treatment of print and broadcast media by pointing to any compelling state interest.[18] The Supreme Judicial Court was likewise unable to point to any compelling state interest for the differing treatment. Indeed, the court did not even attempt to point to any compelling state interest, but chose instead to knock over two straw men. First the court observed that the fact that a "company is engaged in communication as a business, of course, does not

---

[16] The ability of any person or entity to speak effectively is related to the amount of money it has available to spend for that purpose. *See*, Buckley v. Valeo, 424 U.S. 1, 19 (1976).

[17] The fact that the statutes here challenged are taxing statutes rather than general regulatory statutes does not affect the appropriateness of the higher standard of constitutional review. Although generally a classification of property for purposes of taxation will survive a Fourteenth Amendment equal protection challenge if the classification can be considered "rational" on the basis of "any conceivable set of facts," First Federal Savings & Loan Ass'n v. State Tax Comm'n, 372 Mass. 478, 363 N.E. 2d 474 (1977), *aff'd*, 437 U.S. 255 (1978); Beals v. Comm'r of Corps. and Taxation, 370 Mass. 781, 352 N.E. 2d 692 (1976); Weinstock v. Town of Hull, 367 Mass. 66, 323 N.E. 2d 867 (1975) *app. dism.* Weinstock v. Hull, 423 U.S. 805 (1975), this judicial deference is not accorded tax classifications which implicate specific fundamental rights other than equal protection. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). Grosjean, *supra*. *Cf.* Keniston v. Board of Assessors of Boston, Mass. Adv. Sh. 1485, 1490 (1980). Therefore, the Supreme Judicial Court's fleeting attempt to justify the statutes' different treatment of Westinghouse and the newspapers by noting that "[t]ax statutes customarily make narrow distinctions without running into trouble on a constitutional level," (App. A. at A-6), must fail.

[18] Indeed, although the Commissioner participated in the trial, he did not take the stand nor did he introduce evidence or file a brief which even attempted to justify the differing treatment. Instead, the Commissioner simply fought to keep out of the record any evidence of his treatment of the favored newspapers.

exempt it constitutionally from local or other taxation." (App. A. at A-6.) The same observation was made by this Court in *Grosjean*, 297 U.S. at 250, and Westinghouse has never contended to the contrary. The evil challenged is not exposure to taxation *per se*, but exposure to a state scheme which consciously exempts selected media from taxation imposed on other media.

Second, the Supreme Judicial Court observed that on the given record, it could not determine what the "entire business of the publisher corporations consisted of." (App. A. at A-6.) This claim is analyzed at note 15 *supra*. Suffice it to note here that the uncontradicted evidence in the record is that Hearst, for example, engages only in the business of "newspaper publishing" in the Commonwealth. (App. H. at A-17.)

Given its failure even to attempt to articulate any possible compelling state interest which could justify the disparate treatment of print and broadcast media, the court below, like the Commissioner, implicitly admits that there is no such state interest.

B. *The Application of the Massachusetts Taxing Statutes So As To Exempt Print Media While Taxing Broadcast Media Is Founded on No Rational Basis.*

Massachusetts' disparate taxing treatment of the print and broadcast media could not survive review under the Equal Protection Clause of the Fourteenth Amendment even if there were no First Amendment implications. There simply is no rational basis to justify classifying newspapers as "manufacturing" corporations and exempting them from local taxation while taxing television[19].

---

[19] Some difference in treatment of broadcast media from print media is, of course, accepted where based upon material distinctions between the various forms of media. For example, the courts have recognized that there is a greater need for general regulation of a broadcast media because the air and sound waves are a limited resource, whereas presumably anyone can find paper and ink to print or add a page to a newspaper or pamphlet. *See, e.g.*, FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 799 (1978). Columbia Broadcasting

At the very least, a state's classification of the subjects of taxation must be reasonable and non-arbitrary in order to survive an equal protection challenge. *WHYY, Inc.* v. *Glassboro*, 393 U.S. 117 (1968); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528 (1959); *Liggett Co.* v. *Lee*, 288 U.S. 517, 536 (1932); *Board of Tax Commissioners* v. *Jackson*, 283 U.S. 527 (1930).

As this Court has said:

> While reasonable classification [of the subjects of taxation] is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.

Southern Railway v. *Greene*, 216 U.S. 400, 417 (1910).

Both Westinghouse and the newspaper companies create, package and disseminate the same general types of information to the public. Like newspapers, Westinghouse employs a creative

---

System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). *Cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). This distinction has never been used to justify different tax treatment, however, but rather has been raised where there are issues of the licensing of or public access to that resource. Such a distinction cannot be used to rationalize the discriminatory effects of the particular aspects of the Massachusetts tax system pertinent here, which arguably were intended to attract manufacturing businesses to Massachusetts by alleviating the local tax burdens to be faced by those businesses. Assessors of Boston v. Comm'r of Corps. & Taxation, 323 Mass. 730, 741, 84 N.E. 2d 129 (1949). Comm'r of Corps. & Taxation v. Assessors of Boston, 321 Mass. 90, 95-96, 71 N.E. 2d 874 (1947). The scarcity of air and radio waves provides no logical basis for treating newspapers as manufacturers, but not broadcasters, when both are engaged in producing news, entertainment and other information for the public to consume and for advertisers to sponsor. To do so would be akin to treating a clothing factory as a manufacturer, but not a jewelry factory, merely because gold and silver are rare commodities whereas the raw materials for clothing are relatively abundant. In short, any differences between the media are no more material to this case than were differences between large and small publishers material in *Grosjean*.

staff to develop and research stories, to write and edit copy, to design and produce art work, and to produce technically the final product—a television or radio program. The product created by Westinghouse, like the product created by the newspaper companies, provides the public with news stories, editorials, sports coverage, and entertainment. (App. A. at A-2.) Both provide and sell "space" to advertisers who wish to promote goods or services by placing advertisements where potential customers will see them. There is no conceivable difference between the dissemination of information and advertising by means of paper as opposed to electromagnetic radiation that could have a rational connection to the administration of the tax system. As the Appellate Tax Board itself recognized, the fact that the end product of a company is intangible is not a sufficient basis to deny it manufacturing status. (App. C., App. D.) Finally, any desire of the Commonwealth to raise revenue bears no rational relation to a tax scheme which subjects the property of broadcasters to taxation while exempting from taxation the property of print media. Here again, perhaps the most telling fact is that the court below failed to articulate—or even to attempt to articulate—any rational basis for the differing treatment. (*See* App. A. at A-6.)[20]

Conclusion

For the reasons stated above, Westinghouse prays that probable jurisdiction be noted.

Respectfully submitted,

PAUL J. LAMBERT
JOSEPH L. KOCIUBES
JANE E. SERENE
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
Tel. No. (617) 357-9300
Attorneys for Appellant

[20] Significantly perhaps, the best the Supreme Judicial Court could do was observe that "narrow distinctions" are often made in tax statutes (of course the distinctions here are made by the Commissioner in applying the statutes) and to imply that while the statutes may be irrational in 1981, that problem is "for the Legislature." (App. A. at A-6, 7.)

APPENDIX A

Mass. Adv. Sh. (1981)

WESTINGHOUSE BROADCASTING COMPANY, INC. *v.* COMMISSIONER OF REVENUE.

Suffolk, December 1, 1980.—January 23, 1981.

Present: HENNESSEY, C.J., BRAUCHER, KAPLAN, WILKINS, & ABRAMS, JJ.

APPEAL from a decision of the Appellate Tax Board.

Joseph L. Kociubes for the plaintiff.

Stephen S. Ostrach, Assistant Attorney General, for the defendant.

KAPLAN, J. In August, 1976, Westinghouse Broadcasting Company, Inc., an Indiana corporation which owns and operates a television and radio station in Boston (WBZ-TV; WBZ, AM and FM) found itself on the Commissioner of Revenue's list of the corporations liable to taxation as of January 1, 1976, but not classified thereon as a manufacturing corporation. The company applied to the State Tax Commission under G.L. c. 58, § 2, for manufacturing classification, so that it would then qualify under the provisions of G.L. c. 63, § 42B, and G.L. c. 59, § 5, Sixteenth, for exemption of its machinery, of an estimated value of $1.3 million, from local taxation.[1] No relief was forthcoming from the Commission, and an appeal to the Appellate Tax Board (G.L. c. 58, § 2) also failed.[2] The company appeals the Board's decision to this court pursuant to G.L. c. 58A, § 13.

[1] For a similar exemption for domestic manufacturing corporations, see G.L. c. 63, § 38C, and G.L. c. 59, § 5, Sixteenth.

[2] The step of an application to the State Tax Commission was eliminated by St. 1978, c. 514, § 35, amending G.L. c. 58, § 2 (and the State Tax Commission was reorganized under the name Department of Revenue by St. 1978, c. 514, § 5).

1. The record made before the Board consisted of a "joint stipulation of facts" (dated in October, 1979) and brief additional evidence. Emerging from the record was a picture of operations that is apparently familiar in television and radio broadcast.

We sketch the television side, which accounted for 80% of the company's combined television and radio income. Some 33% of air time consisted of programs produced by the company—a miscellany of news, sports, and other material largely of a local character. The balance of time was given over to material supplied by the network and others. Ninety-four per cent of TV income was derived from the sale of advertising displayed during the broadcasts;[3] less than 5% was compensation for carrying network programs.

With respect to the technique of accomplishing the broadcast of the visual element of the programs, the stipulation found it convenient to mention five chief sources or components. (i) Live programs. TV cameras receive light waves reflected from the studio subjects; these are transformed by the cameras into electrial impulses. (ii) Films or slides. Light is projected through these transparencies and similarly transformed into electrical impulses. (iii) Video tapes. Magnetic impulses (themselves resulting from transformation of electrial impulses derived from light) are stored on the tapes; these are transformed back into electrical impulses. The electrical signal from sources (i), (ii), and (iii), after a complicated process, reaches the television transmitting station in the form of a microwave signal. The microwave signal is changed into a one-volt electrical impulse which is built into a 60,300 watt signal; this is transformed into electromagnetic waves which, after modulation (superimposition on WBZ 's frequency carrier wave), are radiated by the transmitter and received by the antennas of television receiving sets.

[3] The record indicates ther 67% of the 94% came from advertising aired during the company-produced programs.

(iv) Mobile units. The electrical impulses in the TV cameras are transformed by equipment in the mobile units into microwave signals; these emerge from further processing as a one-volt electrical signal with a sequence as above. (v) Network. These programs are received over telephone lines as electrical impulses; the signals are improved and converted into a microwave signal for treatment and broadcast by a transmitter as indicated above.[4]

The handling of sound for radio broadcast may be taken as comparable to the treatment of the element of sound for TV broadcast and is sketched briefly in the record thus. Sound—live or from records or audio tapes—is "shaped" and converted into electrical impulses which are sent over telephone lines to a transmitter. Through a process of modulation similar to that for the TV visual element, WBZ's radio signal is impressed on its carrier wave for transmission to the receiving sets. As to the company's radio operations, the stipulation adds that 98% of the programming was produced by the company, and 95% of the income was derived from advertising aired during that programming.

The names of the company's departments are indicative of the range of work, from preparing programs to the final broadcasts, carried out by the 317 company employees: news, technical, programming, prop, art, retail production, sales, administrative.[5]

2. The State Tax Commission's form of "Application for Classification of Corporation" asked for a description of the "actual manufacturing process or activity performed," and the company's answer, which may stand as an encapsulation of

[4] A sixth source or component is "character generator," a machine with a keyboard on which text is typed. As converted into electrical impulses, the text is mixed into the relevant transmissions.

[5] The company fabricated stage sets, and so forth, on which it mounts the programs it produces, but this kind of activity is no more "manufacture" than the production of a play in the theatre. The claim of manufacture concentrated on the transformations culminating in the radiation of the signals to the receiving sets.

the present record, was the following. "TV broadcasting: optical information is changed into an electrical signal which is modified in many ways by the application of extremely complex technology, encoded and placed on the broadcaster's carrier and sent out to be received by a receiving set at a great distance. Radio broadcasting: acoustical energy is changed into an electrical signal and beamed through the broadcaster's carrier to receiving stations." We think the Appellate Tax Board cannot be held wrong as a matter of law (*see Hopkinton LNG Corp.* v. *State Tax Comm'n*, 372 Mass. 286, 288 [1977]) in deciding on the basis of such a submission that the company was not a manufacturer in the statutory sense.

We quote from *First Data Corp.* v. *State Tax Comm'n*, 371 Mass. 444 (1976): "As the statute does not itself effectively define 'manufacturing,' we have said that the Legislature should be supposed to have adopted the common meaning of the word, as assisted by a consideration of the historical origins of the enactment." *Id.* at 447. Popular understanding, we suggest, is approximated by the expression in *Commissioner of Corps. & Taxation* v. *Assessors of Boston*, 321 Mass. 90, 94 (1947): "Manufacture ordinarily and commonly denotes the process of transforming raw or finished materials by hand or machinery, and through human skill and knowledge, into something possessing a new nature and name and adapted to a new use." This statement can apply to the broadcasting process only by a considerable distortion of the meaning; the process is more naturally and more aptly described, in distinction to manufacture, as a transmission of intelligence. That is how we characterized the operation of the "commercial on-line, real-time computer time-sharing system" involved in the *First Data* case, to which the present case bears much resemblance, as do the cases indicating that the telephonic process, by which human sound is transformed into electrical impulses and those impulses changed back into cognizable sound, is not a process of manufacture. See *Assessors of Boston* v. *Commissioner of Corps. & Taxation*, 323 Mass. 730, 741 (1949);

Assessors of Springfield v. *Commissioner of Corps. & Taxation*, 321 Mass. 186, 190-192 (1947). The Board in the present case did indeed allow a request for a ruling that "Westinghouse may not be denied manufacturing status merely because its end product is intangible." That proposition conformed to our view that the production of electricity may entail manufacture (see *Boston Gas Co.* v. *Assessors of Boston*, 334 Mass. 549, 565 (1956); *Boston & Me. R.R.* v. *Billerica*, 262 Mass. 439, 449 [1928]), but it does not go far enough to resolve the question of manufacture here.

As to the historical origin of the legislation, we have pointed out that the exemption arose from an attempt to save the factories that had fallen into a distressed condition in the Commonwealth around 1936. Broadcasting is outside this matrix of intention and expectation. Cf. *Charles River Breeding Laboratories, Inc.* v. *State Tax Comm'n*, 374 Mass. 333, 336 (1978).

Decisions of other jurisdictions are not likely to have direct bearing because of peculiarities of the various taxing schemes. Yet it may be recorded as suggestive that Pennsylvania has lately held that the same company, in respect to its television and radio broadcasting in Pittsburgh through station KDKA, was not exempted by a provision of a "local tax enabling act" which barred municipalities from levying tax "on any privilege, act or transaction related to the business of manufacturing." *Golden Triangle Broadcasting, Inc.* v. *Pittsburgh*, 483 Pa. 525 (1979). See also *Commonwealth ex rel. Luckett* v. *WLEX-TV, Inc.*, 438 S.W.2d 520 (Ky. 1968);[6] *Meredith Corp.* v. *State Tax Comm'n*, 23 Ariz. App. 152 (1975). But cf. *Tabulating Serv. Bureau, Inc.* v. *Commissioner of Taxation*, 295 Minn. 562 (1973).

---

[6] This case uses an interesting image: "In the last analysis, the function of television is to transmit a message or communication. It manufactures messages in about the same sense that a common carrier manufactures travel." 438 S.W.2d at 523.

The company attempts a constitutional argument based on the fact that two corporations publishing newspapers in Boston, with which the company competes for advertising, were classified by the Commissioner as manufacturing corporations. This is said to involve a breach of the guaranty of equal protection of the laws, the guaranty being perhaps the more sensitive here, it is suggested, because broadcasting and newspaper publishing are First Amendment activities. That the company is engaged in communication as a business of course does not exempt it constitutionally from local or other taxation. See *Opinion of the Justices*, Mass. , , (1979).[6] As to the claim of invidious discrimination because certain corporations publishing newspapers received the manufacturing classification while the company did not, we are unable on the present record to make any judgment because what, precisely, the entire business of the publisher corporations consisted of was not presented in any detail. Tax statutes customarily make narrow distinctions without running into trouble on a constitutional level, and application of a concept like "manufacture" necessarily involves close line-drawing.[7] The case of *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), cited by the company, is not in point: the Court recognized and condemned a design to put the clamps on expression by newspapers—"a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." At 250.

---

[6] Mass. Adv. Sh. (1979) 1773, 1779.

[7] *Golden Triangle Broadcasting, Inc.* v. *Pittsburgh*, cited in text, affirmed a judgment of the Pennsylvania Commonwealth Court, 31 Pa. Commw. Ct. 547 (1977). The opinion of the latter court reconciled its denial of exemption to the company, engaged in broadcasting, with its previous decision in *Pittsburgh* v. *Pittsburgh Press Co.*, 14 Pa. Commw. Ct. 551 (1974), allowing exemption to the publisher using its own presses and other machinery. See *Federal Communications Comm'n* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978). Cf. *Assessors of Boston* v. *Commissioner of Corps. & Taxation*, 323 Mass. 730, 739 (1949); *Hearst Corp. (News American Div.)* v. *State Dep't of Assessments & Taxation*, 269 Md. 625 (1973).

We add, what we have had occasion to say before,[8] that the criterion of manufacture, as defined in the light of its historical provenience, may not serve the needs of the year 1981. But redefinition is for the Legislature.

The decision of the Appellate Tax Board is affirmed.

So ordered.

---

[8] See *First Data Corp.* v. *State Tax Comm'n*, 371 Mass. 444, 448 (1976); *Charles River Breeding Laboratories, Inc.* v. *State Tax Comm'n*, 374 Mass. 333, 336 (1978).

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH.

AT BOSTON, January 23, 1981.

IN THE CASE No. SJC- 2192

WESTINGHOUSE BROADCASTING COMPANY, INC.
vs.
COMMISSIONER OF REVENUE

pending in the Appellate Tax Board No. 86417

ORDERED, that the following entry be made in the docket; viz.,

The decision of the Appellate Tax Board is affirmed.

By the Court,
(s) PATRICK J. HURLEY, CLERK.

January 23, 1981.

OVER

APPENDIX C

THE COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

DOCKET NO. 86417

WESTINGHOUSE BROADCASTING COMPANY, INC.,
APPELLANT

v.

MASSACHUSETTS STATE TAX COMMISSION,
APPELLEE

APPELLANT'S REQUESTS FOR RULINGS OF LAW

Appellant, Westinghouse Broadcasting Company, Inc. ("Westinghouse"), hereby requests that the Board make the following rulings of law:

1. Westinghouse is entitled to be classified as a manufacturing corporation for purposes Gen. Laws c.59, 60A and 63.

2. Westinghouse may not be denied manufacturing status merely because its end product is intangible.

3. Westinghouse may not be denied manufacturing status because many of the transformations it makes are invisible to the naked eye.

4. The construction of sets, props and graphics constitutes manufacturing.

5. The production and staging of television and radio programming and the subsequent transformations of (i) light and radio waves into a one-volt electrical current, (ii) electrical current into microwave waves, (iii) microwaves into one-volt electrical impulses, (iv) one-volt electrical impulses into electromagnetic amplification, and its amplification into a 60,300 watt signal which is, (v) radiated into the atmosphere in a form capable of being received by television antennae constitute manufacturing.

6. The mixing of various audio and visual impulses in the studio and master control rooms (Joint Stipulation of Facts, ¶¶33-36) and the improvement and modification of the impulses received by the master control room constitute broadcasting.

7. The activities described in paragraphs 4-5, *supra*, *in toto*, constitute manufacturing.

8. The production of local programming by Westinghouse is a substantial portion of its business since WBZ-TV derives some 67 percent of its revenues from programs it produces and WBZ-Radio produces nearly all of its programming.

9. For purposes of being classified as a manufacturing corporation, there is no difference, as a matter of law, between a newspaper printing on paper and Westinghouse broadcasting in the atmosphere.

10. There is no compelling state interest which is served by classifying and taxing Westinghouse, a broadcaster, differently from newspapers.

11. There is no state interest at all which is served by claassifying and taxing Westinghouse, a broadcaster, differently from newspapers.

12. There is no basis in law for distinguishing for purposes of manufacturing status between Westinghouse and newspapers.

By its attorneys,

PAUL J. LAMBERT
JOSEPH L. KOCIUBES
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

APPENDIX D

FORM 72.

THE COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston, Mass. 02202

Docket No. 86417

WESTINGHOUSE BROADCASTING COMPANY, INC.,
APPELLANT.

STATE TAX COMMISSION,
APPELLEE.

ORDER

Appellant filed 12 Requests for Rulings of Law. Requests Numbered 2, 3, 6, and 8 are given. Request Numbered 4 is given, but the Board does not find such manufacturing to be "manufacturing" as that word is used in the statute, so as to require classification as a manufacturing corporation under the statute. Requests Numbered 1, 5, 7, 9, 10, 11 and 12 are refused.

APPELLATE TAX BOARD
By (s) Ruth L. Kleinfeld Chairman.
Attest:
(s) Richard B. Willis
Clerk of the Board.

Date: Apr 11 1980
(Seal)

A True Copy,
Attest:
(s) ANTHONY J. D'ARCANGELO
First Asst. Clerk of the Board.

APPENDIX E

(SEAL)

THE COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD
State Office Building, Government Center
100 Cambridge Street, Boston 02202

Docket No. 86417

WESTINGHOUSE BROADCASTING COMPANY, INC.,
APPELLANT.

STATE TAX COMMISSION,
APPELLEE.

DECISION

Decision for the appellee.

APPELLATE TAX BOARD
By (s) Ruth L. Kleinfeld Chairman.
(s) PETER J. ALLEN Member.
(s) John P. Mulvihill Member.
(s) RUDOLPH W. OUELLETTE Member.
Attest:
(s) RICHARD B. WILLIS
Clerk of the Board.

Date: Apr 11 1980
(Seal)
Year : 1976
A True Copy,
Attest:
(s) ANTHONY J. D'ARCANGELO
First Asst. Clerk of the Board.

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
No. 2192

WESTINGHOUSE BROADCASTING CO.,
APPELLANT
v.
COMMISSIONER OF REVENUE,
APPELLEE

NOTICE OF APPEAL

Westinghouse Broadcasting Company, Inc. hereby appeals from the Judgment entered by the Supreme Judicial Court in the above-captioned case dated January 23, 1981. The appeal is being taken pursuant to 28 U.S.C. §1257(2).

By their attorney,

(s) JOSEPH L. KOCIUBES,
JOSEPH L. KOCIUBES, Esquire
BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
(617) 357-9300

Dated: April 1, 1981

Received
Supreme Judicial Court
For the Commonwealth
Apr 1 1981

CERTIFICATE OF SERVICE

I, Joseph L. Kociubes, hereby certify that I served a copy of the foregoing Notice of Appeal upon opposing counsel by hand-delivering a copy of same on April 1, 1981, addressed as follows:

Stephen S. Ostrach, Assistant Attorney General
Office of the Attorney General
One Ashburton Place, Boston, MA 02110

(s) JOSEPH L. KOCIUBES
JOSEPH L. KOCIUBES, Esquire

APPENDIX G

Massachusetts General Laws, c. 59, §5, cl. 16(3)

The following property shall be exempt from taxation and the date of determination as to age, ownership or other qualifying factors required by any clause shall be July first of each year unless another meaning is clearly apparent from the context; provided, however, that any person who receives an exemption under the provisions of clause Seventeen, Twenty-second, Twenty-second A, Twenty-second B, Twenty-second C, Twenty-second D, Twenty-second E, Thirty-seventh, Forty-first, Forty-second or Forty-third shall not receive an exemption on the same property under any other provision of this section, except clauses Eighteenth or Forty-fifth:

. . .

Sixteenth, . . .

(3) In the case of (a) a domestic manufacturing corporation as defined in section thirty-eight C of chapter sixty-three or (b) a foreign manufacturing corporation as defined in section forty-two B of said chapter, all property owned by such corporation other than the following:— real estate, poles and underground conduits, wires and pipes.

. . .

Massachusetts General Laws c. 63, §38C

Every corporation organized under or subject to chapter one hundred and fifty-six B which is engaged in manufacturing, or in research and development of products capable of being manufactured in this commonwealth, shall for the purposes of this chapter be deemed to be a domestic manufacturing corporation, or a domestic research and development corporation. Every domestic manufacturing corporation shall be taxed in the same manner and shall have the same duties under this chapter and chapter sixty-two C as a domestic business corporation, except insofar as the determination of the excise

under this chapter may be affected by reason of the exemption from local taxation of the machinery of a domestic manufacturing corporation. A domestic research and development corporation for the purposes of this section is one whose principal activity is research and development and which, during the taxable year, derives more than two thirds of its receipts from such activity and derives more than one third of its receipts from the research and development of tangible personal property capable of being manufactured in this commonwealth. Nothing in this section shall be construed to provide for an exemption from local taxation of the machinery of a corporation deemed to be a domestic research and development corporation which is not deemed to be a domestic manufacturing corporation.

Massachusetts General Laws c.63, §42B

Every corporation, association or organization established, organized or chartered under laws other then those of the commonwealth, which has a usual place of business in the commonwealth and is engaged in manufacturing therein, or engaged therein in research or development of products capable of being manufactured therein, shall, for the purposes of this chapter, be deemed to be a foreign manufacturing corporation or a foreign research and development corporation. Every foreign manufacturing corporation shall be taxed in the same manner and shall have the same duties under this chapter and chapter sixty-two C as other foreign corporations, except insofar as the determination of the excise under this chapter may be affected by reason of the exemption from local taxation of the machinery of a foreign manufacturing corporation. A foreign research and development corporation for the purposes of this section is one whose principal activity herein is research and development and which derives more than two thirds of its receipts assignable to the commonwealth from such activity and derives more than one third of its receipts assignable to the commonwealth from the research and

development of tangible personal property capable of being manufactured in this commonwealth. Nothing in this section shall be construed to provide for an exemption from local taxation of the machinery of a corporation deemed to be a foreign research and development corporation which is not deemed to be a foreign manufacturing corporation.

APPENDIX H

THE COMMONWEALTH OF MASSACHUSETTS
JOHN F. X. DAVOREN
Secretary of the Commonwealth
State House
Boston, Mass. 02133

FOREIGN CORPORATION CERTIFICATE

We, Harvey L. Lipton, Vice President and Joseph C. Hagan, Assistant Secretary of The Hearst Corporation, in compliance with the provisions of General Laws, Chapter 181, Section 4, certify that:

1. The exact name of the corporation, including any words or abbreviations indicating incorporation or limited liability is:
   The Hearst Corporation
2. The corporation is organized under the laws of:
   Delaware
3. The date of its organization is:
   July 13, 1920
4. The location of its principal office is:
   959 Eighth Avenue, New York, New York 10019
5. A brief description of the activities of the corporation within the Commonwealth of Massachusetts is as follows:
   Newspaper Publishing
6. The location of its local office in the Commonwealth of Massachusetts, if any, is:
   300 Harrison Avenue, Boston, Massachusetts
7. The name and address of its resident agent in the Commonwealth of Massachusetts, if any, is:
   C T Corporation System
   10 Post Office Square
   Boston, Massachusetts 02109
8. The date on which the corporation's fiscal year ends is:
   December 31

A True Copy,
Attest:
(s) ANTHONY J. D'ARCANGELO
First Asst. Clerk of the Board.

9. The duration of its existence:
   Perpetual
10. The names and residence addresses of its directors and the following officers are as follows:

	NAMES	RESIDENCES
President	Frank Massi	959 Eighth Avenue, New York, New York 10019
Treasurer	Harrison A. Mitnick	959 Eighth Avenue, New York, New York 10019
Secretary	Harvey L. Lipton	959 Eighth Avenue, New York, New York 10019
Board of Directors	Schedule Attached	

THE HEARST CORPORATION

SCHEDULE OF DIRECTORS

R. E. Berlin	959 Eighth Avenue, New York, New York 10019
Amory J. Cooke	San Francisco, California
Phoebe Hearst Cooke	San Francisco, California
Richard E. Deems	959 Eighth Avenue, New York, New York 10019
David W. Hearst	Los Angeles, California
George Hearst, Jr.	Los Angeles, California
John R. Hearst, Jr.	959 Eighth Avenue, New York, New York 10019
Randolph A. Hearst	San Francisco, California
W. R. Hearst, Jr.	959 Eighth Avenue, New York, New York 10019
H. G. Kern	Boston, Massachusetts
Frank Massi	959 Eighth Avenue, New York, New York 10019
John R. Miller	959 Eighth Avenue, New York, New York 10019
Harrison A. Mitnick	959 Eighth Avenue, New York, New York 10019
Raymond J. Petersen	959 Eighth Avenue, New York, New York 10019
J. Kingsbury Smith	Rome, Italy
Franklin C. Synder	Pittsburgh, Pennsylvania

A True Copy,
Attest:
(s) ANTHONY J. D'ARCANGELO
First Asst. Clerk of the Board.

11. The fees imposed by the laws of the jurisdiction under whose laws the corporation has been established, organized or chartered, on corporations organized under the laws of the Commonwealth of Massachusetts or on their agents doing business in that jurisdiction are

NOT APPLICABLE—CORPORATION REGISTERED PRIOR TO JANUARY 1, 1974.

The corporation hereby appoints the Secretary of the Commonwealth of Massachusetts and his successor in office to be its attorney in and for Massachusetts, upon whom all lawful process in any judicial or administrative proceeding in Massachusetts may be served so long as any liability incurred in the Commonwealth of Massachusetts while it was doing business in said Commonwealth shall remain outstanding.

IN WITNESS WHEREOF AND UNDER THE PENALTIES OF PERJURY, we hereto sign our names this 9th day of May, 1974.

HARVEY L. LIPTON
Vice President

JOSEPH C. HAGAN
Assistant Secretary

A True Copy,
Attest:
(s) ANTHONY J. D'ARCANGELO
First Asst. Clerk of the Board.

THE COMMONWEALTH OF MASSACHUSETTS

FOREIGN CORPORATION CERTIFICATE
(General Laws, Chapter 181, Section 4)

I hereby approve the within Certificate and, the filing fee in the amount of _____X_____ having been paid, said Certificate is deemed to have been filed with me this 3 day of July, 1974.

* Filing fee not required pursuant to Section 2 of Chapter 844 of the Acts of 1973.

(s) JOHN F. X. DAVOREN
JOHN F. X. DAVOREN
Secretary of the Commonwealth
State House—Boston, Mass.

TO BE FILLED IN BY CORPORATION
Photo Copy of Certificate to be Sent
To
The Hearst Corporation
959 Eighth Avenue
New York, New York 10019

RECEIVED
(Date Illegible)
SECRETARY'S OFFICE

Copy Mailed
(Date Illegible)

A True Copy,
Attest:
(s) ANTHONY J. D'ARCANGELO
First Asst. Clerk of the Board.

Office-Supreme Court, U.S.
FILED
MAY 21 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1769

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

WESTINGHOUSE BROADCASTING COMPANY,

Appellant,

v.

COMMISSIONER OF REVENUE

Appellee

On Appeal From The Supreme Judicial Court
For The Commonwealth of Massachusetts

MOTION TO DISMISS

FRANCIS X. BELLOTTI
Attorney General

Mitchell J. Sikora
Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, MA 02108
(617) 727-1031

On the Brief:

Stephen S. Ostrach
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-1004

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

Prior Proceedings 2
Statement of Facts 5

ARGUMENT 5

I. THE RECORD IS INADEQUATE FOR THE COURT TO CONSIDER THE QUESTIONS WESTINGHOUSE SEEKS TO RAISE 5

II. MASSACHUSETTS MAY CONSTITUTIONALLY DISTINGUISH BETWEEN MANUFACTURING AND NON-MANUFACTURING CORPORATIONS FOR PURPOSES OF ITS GENERAL CORPORATE EXCISE TAX EVEN THOUGH AN INCIDENTAL CONSEQUENCE OF THAT ACTION MAY BE TO TAX NEWSPAPER PUBLISHERS DIFFERENTLY FROM RADIO AND TELEVISION STATIONS 10

CONCLUSION 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

CASES

Arno v. Stewart, 245 Cal. App. 2d 955 (1966) 17n

Associated Press v. United States, 326 U.S. 1 (1945) 12n

Branzburg v. Hayes, 408 U.S. 665 (1972) 12n

Joseph Burstyn Inc. v. Wilson, 343 U.S. 495 (1952) 14

Cardinale v. Louisiana, 394 U.S. 437 (1969) 9, 10n

Chandler v. Florida, ___ U.S. ___, 49 U.S.L.W. 4141 (1981) 15n, 16n

Estes v. Texas, 381 U.S. 532 (1965) 15n, 17

Federal Communications Commission v. National Citizens Committee, 436 U.S. 775 (1978) 11, 12n

Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978) 14, 17

Fernandes Super Markets, Inc. v. State Tax Commission, 371 Mass. 318 (1976) 8n

First Data Corp. v. State Tax Commission, 371 Mass. 444 (1976) 18

Franki Foundation Co. v. State Tax Commission, 361 Mass. 614 (1972) 18

Grosjean v. American Press Co., 297 U.S. 233 (1936) 11, 19n, 20n

Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376 (1973) 12n

Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969) 14

Richmond Newspapers Inc. v. Virginia, ___ U.S. ___, 48 U.S.L.W. 5008 (1980) 15n

Westinghouse Broadcasting Co. v. Commissioner of Revenue, Mass. Adv. Sh. (1981) 183, 417 N.E. 2d 191 3

STATUTES

Cal. Civ. Code §§46, 48.5(4) 17n

Mass. G.L. c. 63, §42B 6

RULES OF COURT

Supreme Court Rule 16.1(b) 9, 20

No. 80-1769

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

WESTINGHOUSE BROADCASTING COMPANY,

Appellant,

v.

COMMISSIONER OF REVENUE

Appellee

On Appeal From The Supreme Judicial Court
For The Commonwealth of Massachusetts

MOTION TO DISMISS

QUESTIONS PRESENTED

1. Should this Court decide a constitutional issue that the Massachusetts Supreme Judicial Court held it was unable to decide in view of the state of the record before that Court?

2. Is a state prohibited from distinguishing between manufacturing and non-manufacturing corporations for purposes of its general corporate excise tax solely because one incidental consequence of that choice is to tax newspaper publishers differently from radio and television stations?

STATEMENT OF THE CASE

Prior Proceedings

The appellant, Westinghouse Broadcasting Company, Inc. ("Westinghouse"), sought to be classified as a "foreign manufacturing corporation" since under Massachusetts law a grant of such status would shift a portion of its property from local to state taxation and would lower its overall rate of taxation. Its initial request to the State Tax Commission, the predecessor of the

Commissioner of Revenue, the appellee herein (the "Commissioner") was rejected and it filed an appeal with the Massachusetts Appellate Tax Board, an independent administrative adjudicatory body. Appendix to the Jurisdictional Statement at 1 ("A.1"). That Board heard Westinghouse's appeal on the basis of a joint stipulation of facts and "brief additional evidence." A.2. The Board upheld the Commissioner's decision. Westinghouse then took an appeal directly to the Massachusetts Supreme Judicial Court. A.1. That court also denied Westinghouse's appeal. Westinghouse Broadcasting Co. v. Commissioner of Revenue, Mass. Adv. Sh. (1981) 183, 417 N.E. 2d 191. It devoted the bulk of its opinion to analysis and rejection of Westinghouse's claim that under Massachusetts law its activities as a radio and

television broadcasting company were such as to require the Commissioner to grant it "manufacturing status." A. 2-5. The court noted that courts in Pennsylvania, Kentucky, and Arizona had previously rejected attempts by broadcasters to obtain preferential tax treatment as manufacturers. A.5. The court noted Westinghouse's attempt to make a constitutional argument based on the fact that two companies that publish newspapers in the Boston were classified as manufacturing corporations, A.6, but it held that it was "unable on the present record to make a judgment" on that claim because the entire business of those other corporations was not presented in any detail. Id. This appeal followed. A. 13.

Statement of Facts

The underlying facts in this case are not in dispute. They are drawn from the joint stipulation filed with the Appellate Tax Board and from the "brief additional evidence" presented by Westinghouse to that Board. A.2. Unfortunately Westinghouse did not include the stipulation in its Jurisdictional Statement, but the opinion of the Supreme Judicial Court (A.2-3) sets out a basic picture of the nature of Westinghouse's business activities.

ARGUMENT

I. THE RECORD IS INADEQUATE FOR THE COURT TO CONSIDER THE QUESTIONS WESTINGHOUSE SEEKS TO RAISE

Westinghouse presents this appeal as a case in which the Commonwealth of

Massachusetts has adopted a taxation scheme designed to discriminate against the broadcast media and in favor of print media and suggests the presence of serious First Amendment questions. Its effort must be rejected at the outset because the thin record below has already been found to be insufficient to resolve the questions which it seeks to raise. A fortiori, the even more limited record Westinghouse brings before this Court is inadequate.

The opinion below shows that the statutory scheme at issue involves a general corporate excise tax which distinguishes between manufacturing and non-manufacturing corporations and gives more favorable treatment to the former. A. 1,7; see Mass. G.L. c.63, §42B. Every corporation doing business in the Commonwealth must pay a corporate excise and

for each one the Commissioner must determine whether its particular activities fall within the "matrix of intention and expectation" which defines the legislative understanding of the term "manufacturing." A.5. The record here shows the nature of Westinghouse's broadcasting activities. And that record is fully adequate to demonstrate the rationality of the decision below that those activities are not "manufacturing".

Westinghouse seeks to avoid this result by shifting the focus from its activities to those of other corporations not before this Court or the court or Board below. It alleges that there are companies which publish newspapers which the Commissioner classifies as manufacturers and it contends that denying it such treatment somehow implicates First

Amendment rights. However, the court below, which had the full record before it, saw matters as being less clear. It held that that record was insufficient for it to pass on Westinghouse's claim of "invidious discrimination" because that record did not disclose the "entire business of the publisher corporations . . . in any detail." A.6.[1/] Without an adequate record, the court was unable to determine whether Westinghouse and the publishers actually stood in the same shoes or whether the different tax treatment reflected considerations

---

1/ Such a complete description was necessary if the court were to analyze the Commissioner's decision to treat those publishers as "manufacturers." Under Massachusetts law a corporation is entitled to "manufacturing" status even if its principal activity is not manufacturing so long as "manufacturing" activities constitute a "substantial" or "material" share of the entire operations of the company. See Fernandes Super Markets, Inc. v. State Tax Commission, 371 Mass. 318, 322 (1976).

entirely unrelated to the First Amendment discrimination claimed by Westinghouse.[2/] A.6. Since the Court below declined to pass upon the question Westinghouse seeks to raise, this Court should dismiss Westinghouse's appeal. Supreme Court Rule 16.1(b); Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) (state courts should be given first opportunity to decide constitutional issues).[3/]

2/ The record below was totally limited to Westinghouse and the two publishers and contained absolutely no information on how the Commissioner treated other newspapers or broadcasters with respect to the "manufacturing" criterion. Nor did it contain any evidence about the treatment given to other, arguably analogous, parties such as magazines, cable television companies, or motion picture producers.

3/ Westinghouse seeks to avoid this result by accusing the Supreme Judicial Court of "manufacturing an ambiguity

(footnote continued)

II. MASSACHUSETTS MAY CONSTITUTIONALLY DISTINGUISH BETWEEN MANUFACTURING AND NON-MANUFACTURING CORPORATIONS FOR PURPOSES OF ITS GENERAL CORPORATE EXCISE TAX EVEN THOUGH AN INCIDENTAL CONSEQUENCE OF THAT ACTION MAY BE TO TAX NEWSPAPER PUBLISHERS DIFFERENTLY FROM RADIO AND TELEVISION STATIONS

The starting point for analysis of

(footnote continued)

about the state of the record" (Jurisdictional Statement at 13-14, n.15). This attack is unwarranted and, in any event, misses the mark. Even assuming Westinghouse were right that the state of the record below was adequate for the Supreme Judicial Court to have grappled with Westinghouse's "discrimination" claim, the plain fact is that that court did not do so. This Court normally does not sit to decide matters not decided below. See Cardinale, supra. In effect, Westinghouse is seeking to "appeal" a decision which was never made, and which therefore cannot be the subject of an appeal. In any event, if this Court should disagree with the lower court's view of the inadequacy of the record and also felt that the question Westinghouse seeks to raise must be addressed, the result would be a remand to that court with instructions to decide the case rather than for this Court to address the matter in the first instance.

the Massachusetts tax at issue is recognition that the excise tax and its use of the "manufacturing" criterion is a general tax applied by Massachusetts to all corporations doing business in the Commonwealth. It is thus distinguishable from the tax at issue in Grosjean v. American Press Co., 297 U.S. 233 (1936) which, as this Court recently noted, is ". . . distinguishable in the degree to which newspapers were singled out for special treatment." Federal Communications Commission v. National Citizens Committee, 436 U.S. 775, 801 (1978). Rather the excise is clearly one of "the ordinary forms of taxation for the support of the government" which can constitutionally be applied to the press without infringing upon the First Amendment. Grosjean, 297 U.S. supra at 250. Since "as businessman or employer, a newspaper publisher is not exempt from

laws affecting businessmen or employers generally . . .",[4] it is clear that Westinghouse, just like a newspaper publisher, "may be subjected to nondiscriminatory forms of general taxation"[5] just as it would be subject to other generally applicable regulations such as the antitrust laws.[6]

Westinghouse seeks to avoid the impact of this principle by claiming that its objection here is not to the tax itself but to the fact that the tax is "discriminatory" because, it alleges,

---

4/ Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 400-01 (1973) (Stewart J. dissenting).

5/ Branzburg v. Hayes, 408 U.S. 665, 683 (1972).

6/ See Federal Communications Commission v. National Citizens Committee, 436 U.S. 775, 800 n.18 (1978); Associated Press v. United States, 326 U.S. 1 (1945).

newspapers as "manufacturers" are treated differently. But that claim is nothing more than a restatement of the truism that application of a general statute to various specific cases will necessarily produce varying results. The real issue is whether the basis for the differing treatment is proper.

Westinghouse itself has fairly stated the appropriate test for judging whether government action which results in differing treatment for different forms of the media is proper. As its Jurisdictional Statement (at 16, n. 19) states:

> Some difference in treatment of broadcast from print media is, of course, accepted where based upon material distinctions between the various forms of the media."

Similarly, as this Court recently noted:

> "We have long recognized that each medium of expression

> presents special First Amendment problems. Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 502-03. And of all forms of communication it is broadcasting that has received the most limited First Amendment protection."

Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

In its Jurisdictional Statement Westinghouse implies that the only basis for differential treatment of broacast media and print media is that the former occupy a limited electromagnetic spectrum which the latter do not. Cf. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). While that distinction is a basis for differential treatment, it is not the sole one. For example, in Pacifica Foundation, supra at 748-50, this Court identified the "uniquely pervasive presence" and unique accessibility of broadcasting as actual distinctions between

broadcasting and print media which justified content regulation - - the very core of First Amendment interests.

Another obvious example of a distinction between forms of the media held to justify differential government treatment is the substantial difference between the limited impact of newspaper reporters taking notes and the potentially massive impact of a television or motion picture crew taking pictures or video tape.[7/] The right of newspaper reporters to cover trials is now unquestioned;[8/] but many, if not most,

---

7/ See Estes v. Texas, 381 U.S. 532, 544-50 (1965). Of course, modern technology has reduced the magnitude of this impact somewhat. See Chandler v. Florida, ___ U.S. ___, 49 U.S.L.W. 4141, 4145-46 (1981).

8/ Richmond Newspapers Inc. v. Virginia, ___U.S.___, 48 U.S.L.W. 5008 (1980).

jurisdictions prohibit television coverage of trials or at least place restrictions on how trials are to be covered.[9/]

Each of the above situations illustrates that the government may properly give differential treatment to various forms of the media in circumstances directly relating to content or to the media's right of access. There has never been a requirement that the government show a "compelling interest" to justify such treatment and Westinghouse offers no authority to support such a contention. Instead, as Westinghouse recognizes, it has only been necessary to show that the distinction in treatment is based on a significant and relavant distinction between the media involved. See Pacifica Foundation, supra; Estes,

---

9/ See Chandler v. Florida, supra.

supra. Furthermore, as discussed above, imposition of general taxes on the media does not directly affect its First Amendment right to write or broadcast and so is clearly not as constitutionally suspect as are content or access controls. Arguably, therefore, an even more relaxed test would be appropriate here.

In this case the one key distinction between Westinghouse and the publishers is that the publishers produce and sell tangible articles (i.e. the newspapers themselves) while Westinghouse does not.[10/] Thus the publishers can properly be called "manufacturers," but,

---

10/ It is presumably that difference which, in another context, has led some courts and legislatures to characterize a broadcast defamation as being slander rather than libel. See e.g. Cal. Civ. Code §§46, 48.5(4); Arno v. Stewart, 245 Cal. App. 2nd 955 (1966).

so long as the word receives its natural meaning, Westinghouse Broadcasting's radio and television activities cannot sensibly be called "manufacturing." That distinction which follows necessarily upon application of the "manufacturing" criterion is real and is relevant to the statutory purpose of encouraging development in Massachusetts of heavy industry of the "mills and factories" variety. First Data Corp v. State Tax Commission, 371 Mass. 444 (1976); Franki Foundation Co. v. State Tax Commission, 361 Mass. 614 (1972).[11/] Therefore, it justifies

---

11/ In adopting the "manufacturing" criterion, the legislature may have felt that manufacturing corporations should receive preferential tax treatment because they are more valuable to the state economy, because they employ more workers, because they represent a greater share of the Commonwealth's economic base, because it feared such corporations were leaving the state (the exemption was enacted in the Great Depression) or for

(footnote continued)

different excise tax treatment.

Here the state is applying a general tax law applicable to all corporate taxpayers[12/] and the state has chosen to make the weight of that tax depend in part upon a determination whether the taxpayer is or is not engaged in manufacturing. The state's consideration of the real distinction between the products produced by newspapers and broadcasters in the course of applying that tax law, and its basing differential treatment on that fact, represents a reasoned consideration of a distinction relevant to the

---

(footnote continued)

many other reasons. In any event, Westinghouse does not challenge the facial rationality of the "manufacturing" criterion as one basis for measuring corporate taxation.

12/ Compare Grosjean, supra, in which the tax was only placed on newspapers.

purpose in question. It presents far less of a First Amendment problem than do such cases as Pacifica Foundation, supra, or Estes, supra, and, a fortiori, it does not unconstitutionally impinge upon Westinghouse' First Amendment rights.[13/] Westinghouse's claim to the contrary does not present a substantial federal question and so should be dismissed. Supreme Court Rule 16.1(b).

13/ In any event, Westinghouse has made no factual showing either in this Court or in the Supreme Judicial Court that the tax in question, as a matter of fact, does operate to burden its First Amendment rights or to hamper its business operations in any way. Compare Grosjean, supra where the tax clearly would effectively operate to drive large newspapers out of business. 297 U.S. at 249-51.

CONCLUSION

For the reasons stated above, Westinghouse's appeal should be dismissed.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Mitchell J. Sikora

Mitchell J. Sikora
Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, MA 02108
(617) 727-1031

On the Brief:

Stephen S. Ostrach
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-1004

DATE: May 20, 1981

CERTIFICATE OF SERVICE

I, Mitchell J. Sikora, Assistant Attorney General, hereby swear that I have this day served the within Motion To Dismiss by mailing two copies postage prepaid to: Joseph L. Kociubes, Esq., Bingham, Dana & Gould, 100 Federal Street, Boston, MA 02110.

Mitchell J. Sikora

Mitchell J. Sikora
Assistant Attorney General
Department of Attorney General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-1031

Celia C. DeAngelis

Notary Public
My Commission Expires: 11/4/86

Dated: May 20, 1981